No. 4481

IN THE

United States ~~District~~ Court of Appeals

FOR THE

Ninth Circuit

FRANK C. BERTELMANN, Appellant,

vs.

MARY N. LUCAS, ET AL. Appellees.

Brief for Lincoln L. McCandless

APPELLEE

UPON APPEAL FROM THE SUPREME COURT OF HAWAII

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By .....Deputy Clerk.

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IN THE
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FRANK C. BERTELMANN, Appellant,

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In Equity.
On Appeal from the Supreme Court of Hawaii

Brief for Appellee, L. L. McCandless

I. INTRODUCTORY; SCOPE OF THIS BRIEF.

The Circuit Court sustained the seven demurrers to the amended Bill upon all grounds. The Supreme Court sustained the decree of the Circuit Court, dismissing the Bill, but only expressed an opinion upon two grounds raised by several of the demurrers; namely: adequacy of the remedy at law and multifariousness. Neither of these two grounds were raised by the demurrer filed on behalf of Appellee L. L. McCandless.

In this case, there is one general question upon the merits which affects all of the parties before the Court, to wit: whether the Appellant acquired title, or the right to compel conveyance of title, to the lands in controversy by virtue of his tenders as alleged.

This Appellee L. L. McCandless claims title to an undivided four-ninths (4/9) interest in said lands conveyed to him by warranty deed from Appellant executed after the tenders were made. On the general question on the merits the interest of this Appellee is identical with that of Appellant. The Supreme Court did not express its opinion upon this general question, and the Appellant has requested this Court to express its opinion upon the same. This Appellee respectfully requests the Court to pass upon this question, regardless of its views upon other questions involved, to the end that the main general question on the merits involved may be settled.

The Appellant, in his amended Bill, prays that the deed to this Appellee be cancelled or treated as a mortgage. So far as this relief is prayed, the interest of Appellant and this Appellee are adverse, and as this Appellee deems the statement of the case of Appellant in that regard to be inadequate and misleading in many respects, a separate statement of case is here included.

This brief will be confined to questions touching Appellee L. L. McCandless' demurrer to the amended Bill.

II. STATEMENT OF CASE.

Appellant's father died on the 15th of March, 1895, owning the lands in controversy in this suit. A widow, three sons, and six daughters survived him. Said deceased left a will which was admitted to pro-

bate, by the terms of which he disposed of his estate. This portion of the will is quoted in paragraph II of the amended Bill. (Tr. pp. 5 to 7, inc.) Under the terms of the will, as therein set forth, the Testator's sons, during the period of one year subsequent to the expiration of the lease to the sugar company therein referred to, which lease expired on the first day of November, 1915, could acquire all of the land upon payment, as therein set forth, of $5,000.00 for each of the others' shares or interests. It is also provided that any one son, if the other sons be "short-coming," could acquire the land by making the payments as stated in the will. The two sons, other than Appellant, were "short-coming" within the meaning of the will.

Appellant desired to comply with the terms of the will and gain title to the lands in controversy, but did not have moneys to make tender or payment of the amounts necessary. It is alleged in paragraph XVII of the amended Bill (Tr. pp. 28 to 34, inc.) that Appellant did not have the necessary money to make the payment, to wit: $40,000.00, and that he had a year within which to raise the money. Appellant went about attempting to raise the necessary amount, and applied to Appellee John C. Lane for assistance, and he, the said John C. Lane, endeavored to get various persons to loan money to Appellant but could find no one who was willing to loan Appellant the required amount. Appellant requested Appellee Noah W. Aluli to obtain the amount necessary to enable Appellant to make the payments. Appellant finally secured the

agreement of Appellee L. L. McCandless to advance the $40,000.00. This agreement is set forth fully in said paragraph XVII. This agreement is dated the 30th day of October, 1916. Under its express provision, this Appellee L. L. McCandless agreed to pay $40,000.00 to Appellant, so that Appellant could make tender, and, in return for such payment, the Appellee L. L. McCandless was to receive a four-ninths (4/9) undivided interest in the lands, and said agreement purported to convey a four-ninths (4/9) undivided interest in said lands to Appellee L. L. McCandless.

Appellant received the $40,000.00 from Appellee L. L. McCandless and made tender of the same, and when tender was refused, Appellant deposited the money tendered in The First National Bank of Hawaii at Honolulu, and said money has ever since been held by said bank as tender. (Tr. paragraph VI, pp. 11, 12; paragraph IX, pp. 13, 14.) These tenders were made October 30, 1916 and October 31, 1916.

Subsequent to the tender and deposit of $40,000.00 in the bank as continuing tender, and on November 22, 1916, Appellant executed a conveyance, which, among other things, conveyed to Appellee L. L. McCandless a fee simple title to an undivided four-ninths (4/9) interest in the lands in dispute. This conveyance is by way of warranty deed and is set forth in paragraph XIX of said amended Bill. (Tr. pp. 38, 39, 40, 41.) By separate provisions of the same instrument, Appellant conveyed an undivided two-ninths (2/9) interest in said land to Appellees Noah W. Aluli and John C.

Lane. The consideration expressed in said deed for the conveyance to Appellee L. L. McCandless is the payment of said sum of $40,000.00 to Appellant. The consideration expressed in said deed as given by John C. Lane and Noah W. Aluli in return for the conveyance to them is the fact that they have counseled and acted as attorneys for Appellant. Both the considerations and the conveyances, to Appellee L. L. McCandless on the one hand, and to John C. Lane and Noah W. Aluli on the other hand, are totally distinct and separate. Noah W. Aluli and John C. Lane were Appellant's agents to secure the money. Neither John C. Lane nor Noah W. Aluli were alleged to be the attorneys or agents of this Appellee L. L. McCandless, and they were not such in fact, but were solely agents of the Appellant.

Appellant had the advice of his own attorneys and had the advice of an independent attorney as early as September 17, 1917, and through this attorney, W. J. Robinson, Appellant made demand on Aluli and Lane that they reconvey to Appellant the two-ninths (2/9) interest in said land, upon the ground that such conveyance to Lane and Aluli was obtained through connivance, misrepresentation, fraud and deceit of Lane and Aluli. (Tr. pp. 42, 43.)

Subsequent thereto, and on the 10th day of January, 1918, Appellant, Appellee L. L. McCandless and Aluli and Lane, as plaintiffs, filed a suit in ejectment to recover the lands in controversy. (Tr. pp. 44, 45.) Appellant alleges that by payment of the sum of $40,000.00, which was paid by Appellee L. L. Mc-

Candless to Appellant, Appellant could secure this land, which was worth at that time at least $800,000.00, and more nearly $1,250,000.00. (Tr. p. 34.) It is alleged in said amended Bill that Appellee L. L. McCandless was at liberty to take back the $40,000.00, and it is alleged that said moneys had never been taken back by this Appellee L. L. McCandless, but have remained on deposit in the bank as a continuing tender. The amended Bill further alleges that if he could not acquire $40,000.00, he would lose all rights to acquire the land, which he alleges to be worth $800,000.00 and more. (Tr. p. 34.)

The Appellant on July 10, 1922 filed his original Bill in the above matter and named various Respondents, including as a Respondent this Appellee L. L. McCandless. No affirmative relief was prayed for as against the Appellee L. L. McCandless, and Appellant therein stated that he consented that a decree be entered in favor of this Appellee L. L. McCandless for a four-ninths (4/9) interest theretofore conveyed to him by Appellant by deed of November 22, 1916. On July 25, 1922, Appellant filed his amended Bill, praying for specific relief against Appellee L. L. McCandless. This Appellee filed a Demurrer thereto upon the grounds as set forth in the record, (Tr. pp. 117 to 120, inc.) and relies upon all of the ground of said Demurrer.

III. THE AMENDED BILL DOES NOT STATE A CAUSE OF ACTION AGAINST APPELLEE L. L. McCANDLESS FOR CANCELLATION OR MODIFICATION OF THE AGREEMENT DATED OCTOBER 30, 1916 OR OF THE DEED DATED NOVEMBER 22, 1916.

Under this heading, we shall discuss generally the first six grounds of this Appellee's Demurrer.

The Appellant is praying that the Court treat the agreement dated October 30, 1916 and the deed dated November 22, 1916 as mortgages, or to cancel the same.

The amended Bill does not state any facts showing that at the time the transactions were entered into, any of the parties intended these documents to operate as mortgages. The amended Bill does show that Appellant could not borrow the money necessary to make the tender, and it also shows affirmatively that the agreement dated October 30, 1916 was meant by the parties at the time to be an agreement to convey to Appellee L. L. McCandless a four-ninths (4/9) interest in the property, all of which was procured with the $40,000.00, in return for the tender and payment of the $40,000.00. The amended Bill shows that the parties never intended this agreement to be an agreement for a mortgage, but intended it to be a sale agreement as it shows on its face.

The amended Bill further shows that the deed of November 22, 1916 was meant to be a conveyance of an

undivided four-ninths (4/9) interest in the land to Appellee L. L. McCandless as an absolute conveyance in fee simple, and that it was a warranty deed.

There is no allegation in the amended Bill that Appellant conveyed the four-ninths (4/9) interest to this Appellee by mistake, or that Appellant meant either the agreement or deed to be a mortgage. No acts of the Appellee L. L. McCandless are shown which are fraudulent in regard to the execution of either the agreement or deed. The amended Bill, on its face, therefore, shows that Appellant is asking a Court of Equity to make a new agreement between himself and the Appellee L. L. McCandless—an agreement different than the one that they entered into. The amended Bill showed that Appellant had agreed to convey, and did convey, absolutely a four-ninths (4/9) interest in fee simple, and not by way of mortgage, to the Appellee L. L. McCandless.

Under such circumstances a Court of Equity will not make a new agreement for the parties under the guise of "reformation" of the agreement.

"In general, in order to warrant reformation there must be a mutual mistake; a mistake shared in by both parties." 21 C. J. p. 87, para. 63.

The Supreme Court of the United States holds that in order for a Court of Equity to reform a written contract it must clearly appear that there has been a mistake and

"The mistake must be mutual and common to both parties to the instrument. It must appear that both

have done what neither intended." Hearne v. Marine Insurance Co., 20 Wall 488 at 491.

The parties have made an agreement and a deed which accorded with their full understanding and agreement at the time the same were made, and it is respectfully submitted that as no facts showing any fraud of Appellee L. L. McCandless are alleged, law as well as equity requires the parties to be bound by their agreement and deed.

Upon what grounds does Appellant seek relief from a Court of Equity against the Appellee L. L. McCandless? This does not appear clearly in the amended Bill. On page 122 of Appellant's brief it is contended that the consideration furnished by the Appellee L. L. McCandless was so inadequate that a Court of Equity would hold the transaction fraudulent. Let us see whether there are any allegations of fact showing gross inadequacy of consideration. In paragraph XVIII (Tr. p. 34) Appellant alleges that he could get land worth $800,000.00 to $1,250,000.00 if he could raise $40,000.00—Appellant did not own the land—but he could acquire it by the payment of $40,000. Appellant, through Aluli, his agent, sought out Appellee L. L. McCandless and requested Appellee L. L. McCandless to furnish him, Appellant, $40,000.00, to make the tender. Appellee McCandless did not seek Appellant. Appellee McCandless agreed to furnish the $40,000.00 to Appellant if Appellant would agree to deed, and deed a four-ninths (4/9) interest in the land to Appellee McCandless. Appellant agreed to this, and by this agreement Appellant did not lose anything, but in his amended Bill he shows that by

virtue of this payment and agreement, he, Appellant, gained a two-ninths (2/9) interest in the land. This two-ninths (2/9) interest never cost Appellant one cent —Appellee McCandless furnished the $40,000.00 which procured it for Appellant.

Appellant's amended Bill shows that he not only did not lose anything, but that he gained, without any cost to himself, a two-ninths (2/9) interest in the land.

In the light of the facts as shown in the amended Bill, Appellant has shown no loss arising to him out of the transaction, but has shown a gain of a two-ninths (2/9) interest in the land. How can Appellant claim that the bargain between himself and Appellee McCandless was unconscionable? In fact the Bill shows that Appellant's stand is unconscionable.

The amended Bill shows that Appelant not only lost nothing, but that he made a profit by entering into the transaction.

Appellant, in his brief, has not shown a single case ever decided by any court holding that a transaction can be set aside in equity for alleged inadequacy of consideration, when the Petitioner made a profit from the transaction.

It is submitted that Appellant is not coming into Equity with clean hands—his amended petition and bill show that he used Appellee McCandless to make a profit in 1916, and he now seeks to retain that profit and also to set aside the agreement in order to gain another profit thereby.

In one case, Petitioner contracted to settle financial affairs with her husband for $2000.00, conditional upon her getting a divorce. She got the divorce and

afterwards brought suit in Equity to set the contract aside. The Court held that she did not come into Equity with clean hands. She got the benefit she bargained for by the contract and then, after she got the benefit, i. e. the divorce—she couldn't go back on the bargain. Lake v. Lake, 119, N. Y. S. 686.

Further—the amended petition and bill shows that Mr. McCandless parted with his $40,000.00—and got in return—not the four-ninth (4/9) interest in the land, but an agreement and a deed purporting to pass a four-ninth interest in the land. That was almost nine years ago and the amended bill shows that Appellee McCandless has never had possession of the land; has never received any rents or profits from the land; but, on the contrary, has been involved in costly lawsuits in relation to his claim to the land.

It is respectfully submitted that the amended Bill does not contain facts which support Appellant's claim.

On page 122 of his brief, Appellant cites Williams v. Kaea, 1. Haw. 423, and Souza v. Soares, 21 Haw. 330, on the abstract proposition that gross inadequacy of price may be alone sufficient to prove fraud.

As we have shown above, that proposition is not involved upon the facts as shown in the amended Bill.

Appellant also cites there the later case of Sumner v. Jones, 22 Haw. 23. This case is directly opposed to Appellant's contentions. In this case property owned by Petitioner, which was worth $6,000.00 over and above encumbrances, was conveyed for $500.00, and an agreement to set aside a portion of the rents for life—which portion was not stated. The Supreme Court stated at p. 25 —

"The law recognizes the right of the owner of property, being of sound mind, to sell and dispose of his property upon such terms as he may see fit or to give it away if he desires to . . . ."

The Supreme Court sent the case back to the Circuit Court to take further evidence in relation to Petitioner's mental condition at the time of signing the deed.

It is respectfully submitted that this case must be taken as establishing the law in Hawaii, adversely to Appellant's claim—the Appellant does not contend that he is or was in 1916 mentally incompetent.

The contract and deed are not harsh and unjust, but if they were, yet it is respectfully submitted that a Court of Equity would not render its assistance to the Appellant. He fully understood the contract he was entering into.

"So far as the charge that the contract is harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract." Poe v. Ulrey, 233 Ill. 56 at 63: See also Summer v. Jones, supra.

In one case Petitioner leased standing timber with the right to enter upon the land and cut it, and the Court held, though respondent did not cut it within a reasonable time, a Court of Equity could not cancel the contract.

The Court stated at p. 80:

"There is no law restricting the right of all persons to make contracts to suit themselves, when the contracts

violate no law. The safety of commercial transactions depends upon this. Should courts undertake because of improvidence, to set aside contracts which are lawful, it would invade personal rights and disturb and destroy the safety of business transactions. When parties have made lawful contracts in language, leaving no doubt as to the intention, there is no ground for any interference by the courts, but the contract must be be enforced as written." Butterfield Lbr. Co. v. Guy, 46 So. 78 (Miss.).

The facts alleged in the amended Bill do not show that Appellee took any advantage of Appellant. Even if he had, a contract will not be cancelled, because one party took advantage of the necessitous condition of another where there is no actual fraud. Carley v. Tod 31 N. Y. S. 635.

The cases further show that the mere deriving of an enormous profit out of a transaction is no ground for setting a conveyance aside—or reforming it.

Here, it might be pointed out, the amended Bill has shown no profit that Appellee McCandless has yet realized, for it shows that he has not yet been able to get the land, though the deed was executed nearly nine years ago. Even if Appellee McCandless had realized a profit yet a Court of Equity would not set the agreement and deed aside.

In one case a person owned a vested interest in an estate, which apparently, would not come into possession for years and he sold it for a price equal to about one-fourth (¼) of the principal. The Court held that he couldn't have the sale set aside when the life tenant died a few months after the deed was executed. Jack-

son's Estate, 203 Pa. 33 at 37. See Phillips Estate, 205 Pa. 511.

Mere inadequacy of consideration will not be sufficient to set aside a sale. Cribbons v. Markwood, 13 Gratt. (Va.) 495; To same effect see Provident Life & Trust Co. v. Fletcher, 237 Fed. 104, 109-10;

The Court stated at p. 894:

"The mere fact that a person derives enormous profits as the fruit of an agreement dependent upon contingencies cannot be claimed as sufficient to warrant the court in adjudging the price unconscionably small." Hagan v. Ward, 77 N. Y. S. 893.

This latter case shows that contingencies must be taken into account.

Appellant claims in his brief on pages 122 to 124 that Equity has jurisdiction to grant relief against fraudulent conduct of Lane, the friend and counsellor, and Aluli, the attorney of Appellant, and that McCandless is somehow or other bound by the conduct of Lane and Aluli. All through Appellant's brief he is continuously using the phrase "McCandless and Associates", referring to McCandless, Aluli and Lane. The allegations of the amended Bill show clearly, as we have stated above, that Aluli and Lane were the associates and advisors of Appellant, and it was through them that the Appellee McCandless was enticed into the transaction. Appellant should rather have said "Appellant and his Associates Aluli and Lane."

The argument and statements above referred to are obvoiusly made to attempt to make out a case of implied fraud as to Appellee McCandless. The amended Bill shows that Appellant himself had direct deal-

ings with Mr. McCandless; that Appellant was fully cognizant and aware of all the facts at the time he dealt with Mr. McCandless; that the consideration paid by Mr. McCandless was entirely separate and distinct from the consideration of Lane and Aluli and was different in kind—viz. Mr. McCandless paid $40,000.00, while Messrs. Lane and Aluli paid and were to pay in services—Mr. McCandless was to get a distinct and separate interest, viz: an undivided four-ninths interest in the land. Appellant with full knowledge of the facts dealt directly with Mr. McCandless. Obviously, the cases cited by Appellant do not apply to facts such as are shown by the amended bill in the present case.

It is respectfully submitted that the amended Bill sets forth no case for revoking or cancelling the agreement and deed as against the Appellee McCandless.

IV. THE AMENDED BILL SHOWS THAT THE APPELLANT IS NOW BOUND BY HIS ACQUIESCENCE AND LACHES FROM RAISING A CLAIM FOR CANCELLATION OR REFORMATION AGAINST THE APPELLEE McCANDLESS.

The amended Bill shows that Appellant entered into the agreement to convey a four-ninths (4/9) interest in the land to Appellee McCandless for $40,000.00 will full knowledge of all of the facts. That after this agreement was signed Appellee McCandless paid the consideration, viz: $40,000.00 to Appellant.

Then after Appellant had entered into the agree-

ment on October 30th, 1916, secured the money, and made his tender, he, with full knowledge of all the facts, executed the deed of November 22, 1916, thereby purporting to convey an undivided four-ninths (4/9) interest in the land to Appellee McCandless in fee simple.

The execution of this deed was a ratification of the agreement. See National City Bank v. Wagner, 216 Fed.473. In that case A. made a conveyance to the bank, the court found, under undue influence and fraud, on March 3, 1913. On March 12, 1913, after discovering the fraud, A. made another instrument conveying her equity of redemption to the bank—the Court held that the second instrument ratified and confirmed the invalid first agreement. See also Winston v. Pittfield, 108 N. E. 1038 at 1039.

Also the amended Bill shows that over a year later Appellant joined in the 1918 ejectment suit with McCandless as co-plaintiff, upon the theory that McCandless was the owner of a four-ninths (4/9) interest in the land.

Bringing a suit with full knowledge of the facts, which suit treats an alleged invalid contract or deed as legal, is a ratification of it, and thereafter the transaction is unimpeachable. Merrill v. Wilson, 33 N. W. 716 at 721.

Appellant has heretofore argued that Appellee McCandless cannot be heard to claim that Appellant was guilty of laches when it is apparent from the averments of the Bill that Appellant did not have the independent advice of counsel (other than counsel of

Appellee McCandless) etc. In reply thereto it is stated in paragraph XIX of the amended Bill that in the year 1917 Appellant's attorney was W. J. Robinson and that W. J. Robinson claimed on his behalf that the deed to Aluli and Lane should be cancelled. If affirmatively appears therefore that Appellant did have advice of independent counsel.

Under such circumstances a Court of Equity will not hear a claim by a grantor to set aside or reform his own deed when he waits six years after knowledge of all the facts to bring action, but the Court of Equity will hold the grantor bound by his own acquiescence and laches.

The rule in regard to acquiescence is stated as follows:

"Acquiscence and lapse of time. A second mode by which the remedial right may be destroyed; and the transaction rendered unimpeachable, is acquiescence—The theory of the doctrine is, that a party thus having recognized a contract as existing and having done something to carry it into effect and obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot be afterwards suffered to repudiate the transaction and allege its voidable nature.—

When a party, with full knowledge or at least with sufficient notice or means of knowledge of his rights and of all the material facts, freely does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation—there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." Pom-

eroy Eq. Juris, Par. 965 (and see cases cited).

In one case, plaintiff, upon joining a certain order, transferred, for no consideration at all, all her property to that order. She finally left the order and six (6) years afterwards she brought a suit to annul the conveyance claiming that it was procured by undue influence.

At page 188, the Court states—

"In this state of things, I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them. It was urged that the plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the plaintiff did not know that it was at least questionable whether the defendant could retain the plaintiff's money if she insisted on having it back. In the next place, if the plaintiff did not know her rights, her ignorance was simply a result of her own resolution not to inquire into them." Allcard v. Skinner, L.R. 36, Chan. Div. 145.

In our case the amended Bill shows that appellant deliberately chose not to attempt to avoid his deed.

The Supreme Court of the United States holds, that the absence of a prompt election to avoid a conveyance is an election to confirm it. Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Steinbeck v. Bon Homme Mine Co., 152 Fed. 333;

Appellant executed freely and voluntarily both the agreement and deed which he now seeks to set aside. He has treated the deed of November 22, 1916, as a

perfectly valid deed from the day it was signed up to the filing of the amended Bill herein. In Appellant's original Bill filed herein it is alleged to be a deed. Such course of conduct should be held to be binding upon appellant.

V. REPLYING TO MISCELLANEOUS STATEMENTS IN APPELLANT'S BRIEF.

The statement is contained on page 118 of Appellant's brief that the amended Bill alleges that Appellee McCandless "drove an unconscionable bargain" with Appellant.

In III above we have shown that the amended Bills shows the facts to be that appellant profited by entering into this so-called "unconscionable bargain." The statement above quoted is a mere conclusion of the appellant and it is respectfully submitted that the allegations of fact in the amended Bill are controlling.

The appellant on pages 119 and 120 of his brief states that appellee McCandless reserved the right to withdraw the $40,000. The allegations of the amended bill, however, show that this $40,000 is and has been at all times in the First National Bank as a continuing tender. Appellant is certainly erecting scarecrows to bolster up his unjust and inequitable position. As a matter of fact, appellee L. L. McCandless is the only person who is really seriously out and injured by the whole matter. Appellee McCandless has parted with his $40,000 and for nearly nine years this $40,000 has stood as a continuing tender. Appellant's position in

his brief in this regard shows clearly that he is not coming into equity with clean hands. After having enticed this appellee into putting up $40,000 on appellant's behalf, he has given this appellee nothing but a deed and the privilege of being engaged in expensive litigation in regard to the title to the land conveyed ever since.

It is stated at page 122 in appellant's brief that McCandless claimed the ownership and control of the money after the tender was refused. The allegation in the amended Bill, however, as we have heretofore stated, shows that said money has always been in the possession and control of the First National Bank as a continuing tender.

Dated at Honolulu, T. H., May 1st, 1925.

Respectfully submitted,

Arthur G. Smith
Urban E. Wild
Attorneys for Appellee L. L. McCandless